**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 12**

LAKELAND HEALTH CARE
ASSOCIATES, LLC., d/b/a
WEDGEWOOD HEALTHCARE CENTER

Employer

and Case 12-RC-9426

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1625

Petitioner

## DECISION AND DIRECTION OF ELECTION

Lakeland Health Care Associates, LLC., d/b/a Wedgewood Healthcare Center (the Employer) operates a nursing home in Lakeland, Florida.[1] The Petitioner, United Food and Commercial Workers, Local 1625 (the Union), seeks to represent a unit composed of licensed practical nurses (LPNs).[2] There are 28 full-time LPNs[3] in the petitioned-for unit, including 8 PRN LPNs.[4] The Employer contends that all 28 LPNs are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended (the Act).[5] The Employer argues

[1] The parties stipulated that the Employer is a limited liability corporation incorporated or licensed to do business in Florida, with an office and place of business located at 1010 Carpenter's Way, Lakeland, Florida, where it is engaged in the business of operating a single-facility nursing home, and that during the past 12 months, it has derived gross revenues exceeding $100,000, and has purchased and received at its Lakeland, Florida facility goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.
[2] The petition identifies the unit as "all full-time and regular part-time" LPNs. The petition excludes "all other employees, guards, and supervisors as defined in the Act."
[3] The Employer has no regular part-time LPNs.
[4] The Petition was amended to include the PRN LPNs.
[5] The parties agree that if I find that the LPNs are not supervisors, then the voting eligibility of PRN LPNs should be determined by the formula set forth in Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

that LPNs supervise certified nursing aides (CNAs). There are 96 CNAs, including 42 PRN and part-time CNAs.[6]

A hearing officer of the Board conducted a hearing, and both parties submitted briefs. I have considered the evidence and arguments presented by the parties at the hearing and in their respective briefs. As explained below, I conclude that the Employer has failed to demonstrate, by a preponderance of the evidence, that LPNs are statutory supervisors.

I will first provide a brief overview of the Employer's facility, and describe the duties of the CNAs and LPNs. I will then set forth the basic framework of analysis that the Board uses in deciding supervisory status, after which I will set forth the evidence as to those supervisory indicia that the Employer argues are applicable to LPNs. Finally, I will apply the Board's current case law to this evidence and explain my conclusion.

### 1. Overview of the Facility

The Employer's facility consists of 120 beds divided into two units, each with 60 beds. The Rosewood unit (also known as Northside) houses residents[7] for short-term stays of roughly 25 to 28 days. These residents are usually undergoing rehabilitation after surgery, and upon departing the facility, return to family or an assisted living facility. The Southway unit (also known as Southside unit) is for long-term care residents, and includes 18 beds in a secured area set

[6] The record does not reflect the breakdown between part-time CNAs and PRN CNAs.
[7] All residents are patients, but for consistency, I shall use "residents."

aside for residents with Alzheimer's disease or dementia.[8] Residents with Alzheimer's or dementia require more attention than other residents. Access to and from the secured area is controlled via combination locked doors.

The west side of the facility includes the main dining room,[9] kitchen, maintenance and housekeeping departments,[10] central supply department, and laundry department. The administrator and the director of nursing each have an office directly off the lobby. In addition, the lobby provides access to the business office,[11] the admissions office, the social services office, the payroll office,[12] and the life enrichment office.[13]

The Union already represents a unit of the Employer's nonprofessional employees. The parties' current collective-bargaining agreement (cba) runs from September 30, 2009, until February 28, 2012. The unit as described in the cba includes all full-time and regular part-time employees in the following positions: cook, dietary aide, activities assistant, maintenance assistant, nursing assistant,[14] janitor, laundry aide, and housekeeping aide.[15]

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[8] The halls comprising the Rosewood unit have room numbers in the 200s, 300s, 400s, and some in the 500s. The halls comprising the Southway unit have room numbers in the 600s, 700s, 800s, and some in the 500s. The dementia unit rooms are in the 600s hall.
[9] Dementia residents have their own dining area.
[10] The Employer refers to the housekeeping, maintenance, and laundry departments as the department of environmental services.
[11] The business office oversees payroll, billing and collections.
[12] The medical records director shares an office with the payroll employee.
[13] The life enrichment director oversees volunteers from the community who work with residents, as well as organizing birthday parties for residents, and performing related functions.
[14] This is the same position as certified nursing aide.
[15] The cba excludes from the unit the following positions: administrator, director of nursing, assistant director of nursing, nursing supervisor, charge nurses, all registered nurses, all licensed practical nurses, activities director, social service director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates" and "technical supervisors as defined in" the Act. There is no explanation of the term "technical supervisor."

The Employer refers to LPNs and RNs who are assigned to specific rooms as team leaders.[16] All of the LPNs at issue in this proceeding are team leaders. At the hearing, the Employer and its witnesses referred to LPN team leaders as charge nurses, while the Union and its witnesses maintained that LPNs are referred to in the workplace as team leaders but not charge nurses. The director of nursing testified that she uses "team leader" rather than "charge nurse" because the latter connotes a bull charging at someone. LPNs are issued identification badges with the words "LPN team leader," but not "charge nurse" or "supervisor." However, the record includes the job description for LPNs, which identifies the position as "charge nurse (LPN/LVN)." Various documents in the record refer to LPNs as "team leaders," "team leader/supervisor/department head," and by other rubrics. For the sake of clarity, I shall use the titles LPN and LPN team leader.[17]

LPN team leaders and CNAs work in three shifts: 6:45 a.m. until 3:15 p.m. (the first shift); 2:45 p.m. until 11:15 p.m. (the second shift); and 10:45 p.m. until 7:15 a.m. (the third shift). In the Rosewood unit, there are generally three LPNs and six CNAs scheduled on both the first and the second shifts,[18] and two LPNs and four CNAs scheduled on the third shift. In the Southway unit, there are two or three LPNs and eight CNAs scheduled on the first shift, two LPNs and seven

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[16] Two LPNs and two RNs work in the MDS department (MDS stands for "minimum data set"). The MDS LPNs and RNs mainly track data about residents using a national data base. They do not perform patient care duties. The Union does not seek to represent the MDS LPNs, and at the hearing the parties agreed to their exclusion.

[17] Neither party contends that the RN team leaders belong in the LPN unit. The record does not reflect how many RN team leaders are employed at this facility. It appears from the record that PRN RNs work as team leaders when LPNs are scheduled off, but that there are no full-time RN team leaders.

[18] Staffing varies with the census, or number of occupied beds, as I will explain below in discussing the duties of the staffing coordinator.

to eight CNAs scheduled on the second shift, and two LPNs and five CNAs scheduled on the third shift. The Employer uses PRN LPNs when a scheduled LPN calls off or is on vacation.

The director of nursing works Monday through Friday from about 7:15 a.m. until about 5:30 p.m.[19] Each unit has a unit manager[20] who works from Monday through Friday.[21] An RN works as a nursing supervisor from 3:00 p.m. until 11:00 p.m. on weekdays, and another RN works as a nursing supervisor from noon until 8:00 p.m. on weekdays.[22] There is also an RN who works as the "weekend supervisor;" she works from 7:00 a.m. until 11:00 p.m. on Saturdays and Sundays. The unit managers and nursing supervisors report to the director of nursing.[23] Although the LPN job description states that the LPN reports to the nursing supervisor, the record reflects that the LPNs report to the unit managers until 3:00 p.m. on weekdays, and then to the nursing supervisor who works from 3:00 p.m. until 11:00 p.m. On weekends, LPNs report to the weekend supervisor. There is no RN supervisor or unit manager in the facility on the third shift, from 11:00 p.m. until 7:00 a.m. seven days a week.[24] The director of nursing testified she is on call 24 hours per day, seven days per week, should there be an emergency.

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[19] There is no one in the position of assistant director of nursing.
[20] The unit manager job description states that the unit manager can be an RN or LPN. The current unit managers are RNs. An LPN worked briefly as a unit manager in 2005.
[21] The director of nursing testified that the unit managers work from roughly 7:15 a.m. until 5:30 p.m. The Southway unit manager testified that she works until late in the evening, sometimes the middle of the night.
[22] The RN supervisor working from noon until 8:00 p.m. is primarily responsible for admissions.
[23] The director of nursing and other department heads report to the administrator.
[24] At the hearing, the parties agreed, and I find based upon the record as a whole, that the following positions are excluded because they exercise supervisory authority within the meaning of Section 2(11) of the Act: director of nursing, unit manager, nursing supervisor (weekdays, 3:00 p.m. until 11:00 p.m. and weekdays, 12:00 noon until 8:00 p.m.), and weekend supervisor.

Every weekday at roughly 7:30 a.m., the director of nursing meets with the two unit managers to review significant resident care issues that have arisen over the past 24 hours. At approximately 8:30 a.m., the director of nursing conducts rounds with the social services director and the MDS coordinator. At 9:30 a.m. every weekday, she attends a meeting with the administrator, the business office manager, the MDS coordinator, the admissions coordinator, the housekeeping director, the dietary director, the therapy director, the director of medical records, and the life enrichment director. LPNs do not attend this meeting.[25]

CNAs receive a wage rate between $8.75 per hour and $10.70 per hour.[26] LPNs receive a wage rate between $15.50 per hour and $19.00 per hour.[27] CNAs and LPNs are eligible for the Employer's basic health insurance plan, while CNAs are eligible only after one year for the more comprehensive health insurance plan that the Employer makes available to management upon hire.

### 2. The CNAs' Duties[28]

CNAs perform a range of personal nursing care functions. They assist residents with bathing, dental and mouth care, hair care, and shaving. They help residents dress and undress, lift and turn residents to avoid bed sores, and assist in transferring residents from their beds to chairs, bathtubs, the dining room, etc. CNAs keep residents dry, changing linen and clothing when wet or soiled. They change bed pans and monitor and record bowel routines. CNAs take residents'

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[25] An LPN team leader employed for 10 years at the Employer's facility has never attended a management meeting.
[26] PRN CNAs start at $9.25 per hour and top out at $11.20 per hour.
[27] PRN LPNs start at $16.00 per hour and top out at $19.50 per hour.
[28] Both this section and the next, concerning LPN duties, contain evidence relevant to the supervisory indicia at issue. I will point out such evidence in my analysis.

vital signs. They prepare residents for medical procedures, social programs, family visits, and other activities.

The record includes copies of a one-page document titled "unit shift assignment sheet" (to be discussed in depth below). At the bottom of this document, there is a list of "C.N.A. Duties," which includes "turn and position residents frequently," "clean and cut fingernails PRN,"[29] "foleys and drainage bags in covered bags," "report nutrition and bowel movements," and "beds stripped daily Mon-Fri and weekends if needed."

The record also includes a large binder titled "Nursing Procedure Manual" detailing how to perform hundreds of nursing procedures. Each procedure is described on a separate sheet with sections for "purpose," "equipment," and "procedure." CNAs are responsible for knowing how to perform 15 of these procedures, including "hip precautions" and "nail care."

CNAs document their daily activities caring for each resident on a form known as the Activities of Daily Living (ADL).[30] CNAs also follow instructions contained in the resident's care card, which is maintained at the nurse's station in the book with ADL sheets. The care card contains information specific to the care of the resident, such as whether the resident requires a special diet and whether transferring him requires two CNAs because of the risk of fall.[31]

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[29] It appears from the record that this use of the letters "PRN" refers to the nursing practice procedures manual.

[30] Each nurse's station has an ADL book with sheets for each resident on the halls assigned to that station. CNAs make daily entries in the ADL book.

[31] It appears from the record that the MDS staff oversees care cards, adding or removing information based upon input mainly from CNAs and LPNs. For example, a CNA testified that she contacted the MDS director and received permission to add to a resident's care card a warning that the resident trips and should not be given pads.

CNAs must be certified by the State of Florida and maintain current certification.

The job description for CNA states that the position is supervised by "charge nurse." The LPN team leader meets with the CNA at the end of her shift to update the LPN on the status of the CNA's assigned residents.[32]

### 3. The LPN's Duties as Set Forth in the Job Description And a Unit Manager's List of Team Leader Duties

The LPN team leader begins each shift by receiving report on residents from the LPN team leader coming off of the prior shift. The LPN team leader coming on duty finds out what new treatments have been ordered for residents[33] and what medications must be administered.[34] Early in the shift, the LPN team leader meets with CNAs to tell them to prepare their assigned residents for any special treatments,[35] physician appointments, family visits, etc. The LPN team leader monitors the CNAs throughout the shift to ensure that they perform assigned tasks.[36]

According to the LPN's job description,[37] the LPN is required to perform various "administrative functions" including: "direct the day-to-day functions of the nursing assistants in accordance with current rules, regulations, and guidelines that govern the long-term care facility;" "assure that all assigned nursing

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[32] A CNA who works on the overnight shift testified that he has little communication with his LPN team leader regarding resident care because the residents sleep during much of his shift.
[33] For example, a resident may require more frequent turning in bed than usual.
[34] This information is contained in the Employer's computer system, which the LPN team leader uses. The record does not reflect whether CNAs have direct access to the computer.
[35] For example, the CNA could be responsible for checking a resident's vital signs more frequently than usual or collecting a stool specimen.
[36] LPN team leaders have the authority to change the priorities for tasks performed by CNAs. For example, if a resident has a medical emergency the LPN team manager may instruct the CNA to stop doing whatever he was doing and help with the resident.
[37] As mentioned above, the title on the job description is "charge nurse (LPN/LVN)."

personnel comply with the written policies and procedures established by the facility;" "meet with assigned nursing staff, as well as support personnel, in planning the shift's services, programs, and activities;" and "ensure that all nursing personnel comply with the procedures set forth in the Nursing Service Procedures Manual."

The job description also requires the LPN to perform certain "charting and documentation" functions, such as: "transcribe physician's orders to resident charts, cardex, medication cards, treatment/care plans as required;" and "chart nurses' notes in an informative and descriptive manner that reflects the care provided to the resident, as well as the resident's response to the care."

In addition, the job description requires the LPN to perform certain "drug administration functions," including: "prepare and administer medications as ordered by the physician;" "notify the nurse supervisor of all drug and narcotic discrepancies noted on your shift," and "ensure that prescribed medication for one resident is not administered to another."

The LPN job description additionally sets forth numerous "personnel functions." These include: "inform the nurse supervisor of staffing needs when assigned personnel fail to report to work;" "report absentee call-ins to the nurse supervisor;" "provide leadership to nursing personnel assigned to your unit/shift;" "make daily rounds of your unit/shift to ensure that nursing services personnel are performing their work assignments in accordance with acceptable nursing standards. Report problem areas to the nurse supervisor;" "meet with your shift's nursing personnel, on a regularly scheduled basis, to assist in identifying and

correcting problem areas and/or to improve services;" and "ensure that departmental disciplinary action is administered fairly and without regard to race, color, creed, national origin, age, sex, religion, handicap, or marital status."

The job description lists numerous "nursing care functions," including: "ensure that rooms are ready for new admissions;" "make rounds with physicians as necessary;" "consult with resident's physician in providing the resident's care, treatment, rehabilitation, etc., as necessary;" "make periodic checks to ensure that the prescribed treatments are being properly administered by certified nursing assistants and to evaluate the resident's physical and emotional status;" "ensure that direct nursing care be provided by a licensed nurse, certified nursing assistant, and/or nurse aide trainee qualified to perform the procedure;" "administer professional services such as: catheterization, tube feedings, suction, applying and changing dressings/bandages, packs, colostomy, and drainage bags, taking blood...;"[38] and "ensure that personnel providing direct care to residents are providing such care in accordance with the resident's care plan and wishes."

The LPN job description also contains a small section titled "leadership," which states that the LPN "supervises" CNAs, and possesses "supervisory authority" to "**report[ ] performance related issues of CNAs to nursing supervisor**" (emphasis added).

The record includes four-page exhibit setting forth the "team leader expectations" as prepared by one of the unit managers. The first page of the

[38] LPNs are all IV certified so they can start intravenous medications. The record does not reflect whether the Employer requires this.

exhibit is a sign-in sheet indicating that the unit manager reviewed these expectations with 10 LPN team leaders on August 9, 2010, two days before the instant petition was filed. The exhibit includes a single-page list of expectations for each shift.

The expectations for the third shift include: "work as a team instruct CNA in expectations. Remind them of side duties, especially cleaning wheel chairs as assigned;" "complete skin sweeps (have your CNA tell you when that person is awake);" "follow up with CNA jobs. Chart BM's;" and "be ready to give report @ 6:45 a.m." The expectations for the first and second shifts include: "after receiving report and count, you need to give report to your CNA with your expectations vs. [sic] appointments and baths;" "follow up with CNA duties. Showers completed, men are shaven, residents dressed properly, rooms looking good;" and "ready for report [15 minutes before the end of shift]."

## 4. Legal Framework

Section 2(11) of the Act defines the term supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Oakwood Healthcare,* 348 NLRB 686, 687 (2006). The exercise of that authority, however, must involve the use of

independent judgment. *Harborside Healthcare, Inc.,* 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America,* 277 NLRB 1083, 1084 (1985); see also *Oakwood Healthcare*, 348 NLRB at 687.

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even if this authority has not yet been exercised. *See, e.g., Pepsi-Cola Co.,* 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska,* 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home,* 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

Proving supervisory status is the burden of the party asserting that such status exists, here the Employer. *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 711-712 (2001); *Oakwood Healthcare*, 348 NLRB at 687. As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca,* 338 NLRB 1046, 1047 (2003); *Star Trek: The Experience,* 334 NLRB 246, 251 (2001). Any lack of evidence in the record is construed against the party asserting supervisory status. *See*, *Williamette Industries, Inc.,* 336 NLRB 743 (2001); *Michigan Masonic Home,* 332 NLRB at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on particular

indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusory statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.,* 304 NLRB 193 (1991).

The Employer argues that LPNs possess supervisory authority to discipline, suspend, effectively recommend discharge, assign, and responsibly direct CNAs. Accordingly, I will examine the evidence as to these indicia of supervisory status.

### 5. Evidence as to Whether LPNs Have Authority to Discipline, Suspend, or Effectively Recommend Discharge

The Employer's Handbook establishes two levels of "customer service standards." If a CNA violates Level One,[39] he receives a "coaching plan" form, which documents that he and his "direct supervisor"[40] have developed a "corrective action/coaching plan" to assist the employee in meeting the customer service standards that the CNA breached. Level One coaching plans are active for 12 months from the date of issue, but remain permanently in the employee's personnel file.

An employee who fails to satisfactorily complete his coaching plan by the required deadline receives another Level One coaching plan, unless this would

[39] Level One standards include, "work expectations" such as "clock in and out on time," and "quality expectations" such as "always act professional, respectful, and have a positive attitude."
[40] The Handbook does not identify direct supervisory positions.

create a fourth active coaching plan, in which case the employee is automatically terminated. The record does not reflect any examples of such terminations.

Employees who violate Level Two customer service standards[41] are immediately suspended, pending investigation.[42] If the investigation shows that the employee violated the Level Two standard, the employee may be terminated, or may be reinstated subject to termination for the next violation of a Level One or Level Two standard within a rolling 12-month period.[43] While the record contains examples of CNAs who were discharged for violating Level Two standards, it does not reflect any examples of the discharge of a CNA for violation of a Level One standard.

The only individuals with authority to discharge employees are the administrator and the director of nursing. The director of nursing testified that either she or the administrator reviews each discharge of an employee represented by the Union to ensure that it complies with the collective-bargaining agreement.[44]

The job description for unit manager lists the unit manager's "personnel functions," the first of which is: "day to day supervision of licensed and non-licensed staff, including counseling/disciplinary action, evaluations, one-to-one inservice, suspension/terminations." As mentioned above, the LPN job

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[41] Level Two standards include, "physical or verbal abuse or neglect of a resident, patient, visitor, or other employee" and "refusal to perform job assignment."
[42] The Handbook does not specify who suspends the employee, pending investigation.
[43] The investigation can also disclose that the employee did not commit either a Level One or Level Two violation, in which case he is returned to his position and paid for any missed time and any reference to the matter is cleared from his record.
[44] The record does not reflect any specific requirement for such review in the collective-bargaining agreement.

description states that the LPN "report[s] performance related issues of CNAs to nursing supervisor."[45]

The director of nursing testified that during the two-day orientation for new LPNs, the Employer stresses that they hold leadership roles and that part of that role is the authority to coach CNAs if necessary.[46] The record includes documentation of three inservice training sessions attended by LPN team leaders in 2007 and 2009. A class on March 4 and March 6, 2007, attended by 19 LPNs and RNs, covered Level One and Level Two customer service standards and coaching review forms. An inservice training session on December 18, 2009, attended by five LPNs and RNs addressed clinical programs, team leadership and supervision of CNAs. A 55-minute class covered their authority to coach CNAs when necessary.

With respect to time and attendance violations (Level One), the record reflects that while LPN team leaders issue coaching plans, they exercise virtually no discretion.

The staffing coordinator tracks the attendance records of CNAs. They are assessed an "occurrence" if they are tardy, leave early, or call in sick. They automatically receive a Level One coaching write-up upon accumulating three occurrences within 30 days. When a CNA accrues the third occurrence within 30 days, the staffing coordinator gives copies of the CNA's attendance sheet to

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[45] The unit manager for the Rosewood unit testified that notwithstanding this language, the LPN team leader is supposed to report CNA performance problems "via a coaching," and that "if they don't use a coaching form, then it's a he said/she said..."

[46] A nursing supervisor who worked in 2007- 2008 as a second shift LPN team leader testified that during her orientation, the Employer explained that LPNs were responsible for ensuring that CNAs performed their duties and that this included the authority to issue coaching plans without consulting higher supervision.

the director of nursing, the unit manager, and the payroll department. The unit manager then notifies the LPN team manager and instructs the LPN team leader to issue a Level One discipline. The LPN team leader writes out the Level One coaching form and hands it to the CNA, at which point both sign it.

Additionally, each morning, the staffing coordinator retrieves the daily assignment sheets and unit shift assignment sheets. She then gets together with the payroll employee and compares the daily assignment sheets with a printout of the time records maintained on each LPN and CNA the previous day.[47] If there are any discrepancies, such as evidence that an employee forgot to punch in after lunch or upon returning for a double shift, the payroll employee processes a document called a time clock adjustment slip. The CNA and her LPN team leader sign off on the adjustment slip, after which the payroll employee first adjusts the CNA's time records and then forwards the adjustment slip to the unit manager and the administrator for their signatures; she does not wait for the unit manager and administrator to sign before making the payroll adjustment.

The face of each adjustment slip states that employees are expected to clock in and out correctly, and that any employee incurring more than two adjustments within a pay period or three within 30 days will receive a verbal coaching, followed by a Level 1 coaching upon the next occurrence. The payroll employee tracks the number of missed time clock punches for each employee, and if an employee incurs more than the permitted number of adjustments, she notifies that employee's unit manager. The unit manager then notifies the LPN team manager, who issues the appropriate discipline.

[47] The payroll department provides this printout.

All coaching plan forms (Level One and Level Two) are processed through the payroll office. The payroll employee[48] testified that she receives the coaching plan form after the LPN team leader and the CNA have signed and dated it. She then brings Level One coaching forms to the administrator for signature, after which she files them.[49] She testified that in her experience,[50] most of the Level One coaching forms issued to CNAs are issued by LPN team leaders, and that unit managers coach LPN team leaders, but only infrequently coach CNAs.

The Rosewood unit manager testified that when she started working for the Employer in December 2007, the director of nursing explained "[t]hat the immediate supervisors needed to be the ones to do the coachings; as far as their disciplinary action, they had to be [sic] follow-up with the chain of command."

The record includes several documented Level One and Level Two coaching plans from 2008 through early 2010. They are signed by LPN team leaders on the line designated "supervisor signature" or "coach's signature" depending on the form.[51] None of the LPN team leaders who signed these coaching plans testified at the hearing.

While it appears from the record that in each of these cases, the LPN team leader involved prepared and physically conveyed these coaching plans to

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[48] This witness identified her position as "payroll/human resources." I will refer to her as the payroll employee.

[49] It is not clear from the record what happens to the Level Two forms after the "supervisor" signs and while the Employer is investigating the case. Ultimately, they are returned to the payroll employee for filing.

[50] She has been in the position since 2007.

[51] The record contains two types of Level One coaching plan forms. One form has a line for the "coach" to sign immediately below the employee's signature line, and lines for the "department head" and "administrator" to sign below the coach. The other form has a line for the "supervisor" to sign immediately below the employee's signature line, and a line for the administrator (but not the department head) to sign below the supervisor. The record reflects that the form with a line for "supervisor" replaced the other form, apparently in late 2008. The Level Two coaching plan forms in the record have signature lines similar to the Level One forms currently in use.

the CNA involved, witnesses for the Employer testified that the LPN team leader also initiated them and decided upon or effectively recommended the level of discipline, as opposed to merely carrying out the unit manager's instructions to administer the discipline or following the Employer's standard procedure.[52] However, much of this testimony was conclusory and generalized.

Thus, the director of nursing and a nursing supervisor identified the LPN's handwriting on several Level Two coaching plans signed by LPN team leaders. The Level Two coaching plan form has a sub-title as follows: "This form is to be completed when an employee is being suspended for suspected violation(s) of Customer Service Standards – Level 2." The director of nursing and the nursing supervisor testified that the LPN made the decision to suspend the CNA in each case. Yet nothing on the coaching plan form indicates whether the LPN team leader suspended the CNA on her own or after conferring with the unit manager, nursing supervisor, or director of nursing. When the director of nursing was asked how she knew that the LPN made the decision to issue one CNA a warning rather than discharging him, the director of nursing stated that she relied upon the LPN's signature combined with the fact that that LPN was the team leader of the CNA receiving discipline. In another case, the nursing supervisor admitted that she could not recall what the LPN team leader involved had told

[52] For example, the director of nursing testified that LPN team leaders are responsible for disciplining CNAs, that they initiate coaching plans and make recommendations which are adopted regarding the appropriate level of coaching, and that they make final decisions with respect to discipline other than discharge.

her as regards who suspended the CNA.[53]

Moreover, at one point during the hearing, the hearing officer asked the director of nursing: "Can you give me a specific example where an LPN team leader has suspended an employee for a Level Two infraction?" The director of nursing answered: "I can't just, you know, give a name and a date." The hearing officer asked: "Okay. So you don't have a specific example?" The director of nursing responded: "No, I don't." The unit manager for the Rosewood unit testified that she was aware of only one instance when a team leader issued a Level Two coaching plan.[54]

Similar problems beset the testimony by the director of nursing and the same nursing supervisor that the LPNs who initiated these Level Two coaching plans investigated and made recommendations as to whether to discharge the CNA involved. The record contains no investigatory notes or reports, and fails to reflect the steps taken by the LPN (or others) during any Level Two investigation or how and to what extent the LPN and others participated. The director of nursing testified that the LPN "was involved in" one investigation and "conducted" another, but she did not explain how the LPN participated in these investigations,

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[53] The CNA conduct described in these Level Two coaching plans flagrantly violated Level Two standards. One CNA allowed a resident to smoke while the resident was hooked to oxygen, causing severe burns; another ignored the resident's care card instruction that two CNAs transfer the resident; and another left a resident lying on the dining room floor.

[54] This unit manager testified that the Level Two discipline came about when a CNA informed her that another CNA was sleeping on the job. The unit manager and LPN team leader went to observe this for themselves and actually woke up the CNA. The unit manager testified that she informed the LPN "that's a Level Two coaching." Thus, this incident does not appear to illustrate that LPN team leaders initiate Level Two coaching plans.

and there is nothing specific about this in the documentary record.[55] In another case, the director of nursing testified that she did not recognize the handwriting in the box titled "brief description of violation and investigation," and the coaching plan does not on its face reflect a recommendation by an LPN.

A current RN supervisor, who formerly held a position as an LPN team leader, testified that in 2008, as LPN team leader on the second shift, she started to prepare a coaching plan for a CNA for insubordination and failure to do her assigned job. The CNA became belligerent, started screaming, and "got in [the LPN's] face." At that point, the LPN told the CNA to go home and the CNA threatened her. The LPN then wrote up the incident for the director of nursing, recommending that the CNA be discharged. The director of nursing adopted this recommendation.[56]

The unit manager for the Rosewood unit identified several Level One coaching plans that she signed, that she says reflect occasions on which she received complaints about a CNA's performance from a resident or his family, and communicated the complaint to the LPN team leader along with the instruction to issue the coaching plan.[57] The unit manager testified that upon receipt of the complaint, she talked to the resident and/or family, as well as the CNA involved, to see whether there was a misunderstanding, or whether the

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[55] The coaching plan forms in the record do not contain a space for recommended discipline, and none of the completed coaching plan forms in the record contain narrative descriptions reflecting an LPN's recommendations.

[56] The nursing supervisor also testified that in April 2009, the LPN team leader told her that she had asked the director of nursing to discharge a CNA because of the CNA's conduct. The CNA was discharged. The CNA had allowed a resident to smoke while taking a walk in the facility's courtyard, even though the resident was hooked to oxygen, and the resident suffered burns.

[57] These included some of the current Level One coaching plan forms, which have no line for the department head's signature. The unit manager signed these forms between the signature of supervisor and the administrator.

CNA should be disciplined. It appears from the record that the LPN team leader was not asked for input into these coaching plans.[58] The unit manager also initiates Level One coaching plans upon observing CNAs violate a Level One customer service standard.

The same unit manager further testified that she prepares coaching plans only in cases she investigates, that this represents only about 30 per cent of the coaching plans issued to CNAs, and that the remaining 70 per cent are prepared solely by LPN team leaders without input from the unit manager. She identified several Level One coaching plans that she did not sign or prepare, involving conduct that she did not witness. In each case, the unit manager testified that she recognized the handwriting of the LPN team leader on the signature line and in the box titled "description of violation," although she did not observe the LPN complete the document.[59]

The record contains testimony by the same unit manager concerning two additional Level One coaching plans of the type currently in use.[60] The Employer offered these additional documents and the Hearing Officer rejected them as both duplicative and outside the scope of redirect of the unit manager during

[58] This unit manager also identified Level One coaching plans that resulted from complaints by other employees or supervisors, in which the unit manager investigated and determined that discipline was warranted and conveyed this to the LPN team leader.
[59] For example, according to one Level One coaching plan, issued on July 23, 2009, an LPN asked a CNA for the vital signs for her residents and the CNA replied that she had not taken them, adding "what are you going to do, beat me?" The LPN issued a Level One coaching plan for "poor work quality/productivity." On July 24, 2009, an LPN issued a Level One coaching plan to a CNA who was texting on her cell phone in a residential area while not on break.
[60] These two documents together comprise Employer Exh. 20.

which the Employer sought their introduction.[61] Since these two additional Level One coaching plans are cumulative, I find that the Hearing Officer's ruling rejecting them was correct.

When asked about one of the documents, the unit manager testified that it concerned an occasion when an LPN team leader told her that a CNA had given a resident a bed bath incorrectly. On that occasion, the LPN told the unit manager that she was dissatisfied with such care and that the CNA needed to be coached. Apparently without saying anything about whether a coaching was appropriate, the unit manager told the LPN to use the unit manager's office, and later saw the Level One coaching plan with the employee's and the LPN's signatures. When asked about the other Level One coaching plan in the rejected exhibit, the unit manager testified that she did not recall the incident, but that she recognized the LPN team leader's signature and handwriting, and that the document reflected that the LPN had decided to discipline a CNA for "rough" treatment of a resident. The unit manager acknowledged that she did not observe the incident or see the LPN writing up the coaching plan.

An LPN team leader testified that the weekend supervisor instructed her to prepare and issue the only coaching plan she issued in ten years, which was for a Level One violation.[62] This LPN team leader testified that although she could not recall the exact circumstances (the discipline was issued in January 2009),

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[61] The Hearing Officer noted that that the Employer had introduced, through a different witness, a voluminous exhibit (Employer Exh. 14) containing Level One coaching plan forms, and that the additional documents would be duplicative. Employer Exh. 14 consists of more than 50 Level One coaching plans.

[62] The CNA receiving discipline had refused another CNA's request for assistance in the Alzheimer's unit.

she believes she first talked with the CNA and then consulted the weekend supervisor to decide whether to issue discipline.

A CNA testified that she has received one Level One coaching plan form from her LPN team leader. She testified that the director of nursing saw that she had a wet resident and informed her that this would result in a Level One coaching. Ten minutes later, the LPN team leader, who had not been present when the director of nursing found the wet resident, told the CNA, "I need to write you up. Can you tell me what happened? [The director of nursing] told me to write you up, and that's all I know."

### 6. Evidence as to Whether LPNs Have Authority to Assign CNAs

In general, CNAs are assigned to the same rooms each day. Some CNAs are designated as "floats" and receive room assignments that change regularly depending upon the census and the daily schedule. The Employer uses PRN floats, part-time floats, and full-time floats.[63]

The staffing coordinator[64] prepares the schedule on a monthly basis. Two weeks beforehand, she prepares the daily schedule, which reflects whether anyone has received leave or otherwise will not be working on the day in question. The staffing coordinator later adjusts the daily schedule according to each day's census (number of occupied beds). In essence, the staffing coordinator multiplies the census times 2.8 to calculate the state-mandated total number of hours that must be worked that day. She then allocates those hours among the three shifts.

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[63] The record does not reflect the number of CNAs who float.
[64] This position is also referred to as scheduler. This position reports to the director of nursing.

Each weekday, the staffing coordinator fills out a portion of a document called the unit shift assignment sheet. There is a different unit shift assignment sheet for each team. The staffing coordinator completes the section that sets forth the unit, date, shift, room assignments for the LPN team leader and the CNAs on his team, break and lunch times for each CNA on the team,[65] any doctor's appointments scheduled for residents in the assigned rooms, and whether any of the CNAs on the team have Starlight responsibilities.[66] The staffing coordinator completes this portion of the unit shift assignment sheet for all LPNs and CNAs on the first and second shifts every weekday. Copies of the unit shift assignment sheets are then distributed to the appropriate units.

LPN team leaders occasionally add information on the unit shift assignment sheet during the shift, such as additional resident vital signs that have been taken, resident weights (which must be taken monthly), and whether a particular resident was able to eat in the dining room. The LPN team leader also notes whether room assignments were changed within the team for that shift.[67] The LPN team leader is the only individual who signs off at the bottom of the unit shift assignment sheet. The next day (or Monday in the case of weekend shifts), the staffing coordinator picks up all unit assignment sheets and files them.

On weekends and on third shift during the week, the LPN team leaders are responsible for completing the entire unit shift assignment sheet, including

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[65] Although the director of nursing testified that LPNs postpone lunch breaks for CNAs as needed, the record contains no examples.

[66] Starlight is a program for residents at high risk of falling. Residents perform various activities with a CNA in a separate room.

[67] For example, a nursing supervisor who formerly worked as an LPN team leader testified that she sometimes changed assignments to accommodate residents who did not want to be cared for by their assigned CNAs.

the portion designating room assignments and break times. They do so based on the information the staffing coordinator has placed on the daily assignment sheets,[68] which show the room assignments for each LPN and CNA. An LPN team leader testified that he writes the names of his CNAs onto the unit shift assignment sheet based on the information on the daily assignment sheet, and that the unit shift assignment sheet already has the room numbers and break times inserted.

LPN team leaders are assigned to particular halls.[69] When an LPN team leader is on leave or does not report for a scheduled shift, he is replaced by a PRN LPN or PRN RN. The staffing coordinator maintains the list of PRN LPNs and PRN RNs, and determines whom to call on the list. The record does not reflect whether the staffing coordinator follows a particular procedure when calling PRN LPNs and PRN RNs.

The staffing coordinator testified that all CNAs start as floats, and that the only way a CNA becomes allocated permanently to a specific hallway is upon request of the LPN team leader responsible for that hall.[70] The staffing coordinator testified that she complies with LPN requests for particular CNAs because the LPN knows best how well she works with each CNA and how well the CNA works with particular residents.

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[68] The staffing coordinator leaves the daily assignment sheet on a clipboard at the nurse's station, where CNAs and LPNs view it upon arriving.

[69] The director of nursing testified that LPN openings are posted by shift and hallway, and that the Employer tries to assign LPNs to the same hallways "for continuity of care."

[70] However, the staffing coordinator also testified that CNA positions assigned to permanent halls are normally posted within the facility, and that the director of nursing decides among CNAs seeking the assignment. The Employer's Facility Employee Handbook has a small section on "transfers," which states, in part: "The Facility may transfer employees from one position to another or alter job responsibilities at management's discretion...If interested in applying for a posted position, you should initially discuss this matter with your supervisor."

For example, the staffing coordinator reassigned a floating CNA after that CNA's LPN team leader complained that the CNA had given a resident a bed bath with a wet towel.[71] The staffing coordinator replaced this CNA with one specifically requested by the LPN team leader. The staffing coordinator did not confer with the unit manager or any other supervisor before taking these actions. The staffing coordinator testified that when assigning CNAs who float, she usually complies with LPN requests either to assign or not assign particular CNAs.[72] She testified that, on a weekly basis, she grants requests by LPN team leaders to assign particular CNAs to them. The record does not reflect why other LPN team leaders request specific CNAs.[73] However, the staffing coordinator also testified that once CNA room assignments are made, they are "set" and do not change regularly.[74]

LPN team leaders occasionally reassign CNAs to additional rooms on a given shift for purposes of equalizing the work loads of the CNAs, without consulting the unit manager, RN supervisor or director of nursing. For example, if there have been several discharges from rooms assigned to a CNA, the LPN team leader will assign her additional occupied rooms previously assigned to a different team member.

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[71] The LPN also issued the CNA a Level 1 coaching discipline, as explained above.
[72] For example, when a CNA was out for several weeks because of an injury, her LPN team leader requested a specific floating CNA to be permanently assigned to replace her because that CNA kept up better with the workload, and the staffing coordinator complied.
[73] When asked on direct examination why she agrees to make staffing changes requested by LPNs, the staffing coordinator answered: "It's expected of me. They are the nurses."
[74] The director of nursing testified that most CNAs who are not PRN have the same room assignments every day, and that PRN CNAs float. The staffing coordinator testified that CNAs who float can be PRN or full-time.

LPN team leaders on the third shift sometimes reassign CNAs without consulting the staffing coordinator, RN supervisor, unit manager, or director of nursing. For example, when a CNA assigned to the Southway unit fell ill about two hours into the third shift, the LPN team leader reassigned a third shift CNA from the Rosewood unit to replace the CNA who became ill.[75]

A nursing supervisor who worked as a second shift LPN team leader in 2007-2008 testified that when she was an LPN team leader, she occasionally reassigned a CNA to a different resident without obtaining prior approval, to accommodate the resident's request not to be attended to by that CNA. The same nursing supervisor also testified that when she was an LPN team leader, team leaders sometimes redistributed the resident load when a CNA called in sick.[76] The nursing supervisor also testified that while the staffing coordinator is responsible for the weekday first and second shift unit assignment sheets, LPN team leaders have the authority to transfer CNAs between units, change room assignments and reassign tasks from one CNA to another.[77] An LPN testified that in 2009, before assigning a CNA who had just joined her team (apparently from another hall in the Employer's facility) to any rooms, she asked the CNA where she felt comfortable.

A CNA who will not be able to work as scheduled is supposed to contact the staffing coordinator at least four hours before the start of the scheduled

[75] This occurred about three weeks prior to the hearing. The staffing coordinator did not have first-hand knowledge as to who reassigned the CNA from Rosewood, but concluded it was the LPN because LPNs are the highest authorities at the facility on third shift.
[76] The record does not reflect the frequency of such occurrences.
[77] However, an LPN team leader testified that she has to contact her nursing supervisor before reassigning a CNA from one room to another.

shift.[78] The staffing coordinator determines whether to replace the CNA who called off, based on the census. The staffing coordinator also chooses the CNA to use as a substitute. If a CNA fails to report for work or call in advance ("no call, no show"), the LPN team leader notifies the staffing coordinator, who decides whether to replace the CNA and whom to use.[79]

The staffing coordinator testified that when a Southway unit CNA on third shift does not call or show, the LPN team leader sometimes reassigns a CNA from the Rosewood unit, apparently because state law requires at least three CNAs be assigned to a unit that includes secured beds. .The LPN team leader does so without consulting the staffing coordinator. The staffing coordinator also testified that if there is a no call, no show during third shift, the LPN team leaders "should" contact her to find a replacement, but that the LPN team leaders don't generally do so and instead reassign a CNA from elsewhere in the facility. The record does not reflect what, if any, criteria the LPN team leaders apply in making such reassignments, other than that there must be at least three CNAs on duty in Southway.

The staffing coordinator also determines whether to send scheduled CNAs home during their shifts because of the census. For example, on one occasion, the staffing coordinator directed two CNAs to be sent home on third shift and three to be sent home on first shift due to the census.

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[78] The LPN job description states that the LPN informs the nurse supervisor of staffing needs when assigned personnel fail to report to work, and reports absentee call-ins to the nurse supervisor.

[79] If there is a no call, no show on the weekend, the LPN team leaders, unit managers or nursing supervisors send the staffing coordinator a text message or call her cell phone.

Although the director of nursing testified that LPN team leaders can require a CNA to work overtime, the record does not contain any examples. CNAs asking to leave work before the end of their shift must confer with the LPN team leader. On first and second shifts, the LPN makes a recommendation to the unit manager, who has ultimate authority to approve or deny the request. On third shift, the LPN exercises this authority. It appears from the record that the same procedure is followed whether the CNA's request is based on an emergency or not. There is no record evidence of instances in which an LPN team leader has denied permission for a CNA to leave early.[80]

LPN team leaders have no authority to grant CNA vacation requests or requests for other leave.

**7. Evidence as to Whether LPNs Responsibly Direct CNAs**

There is no evidence in the record that LPN team leaders have been disciplined or held accountable for deficiencies in the performance of the CNAs under their direction. The director of nursing and the unit manager for the Rosewood unit testified that if a CNA fails to properly perform an assigned duty, the CNA's team leader is not written up.[81] An LPN team leader testified that she has never been held responsible for the actions of a CNA or told by her unit manager or a nursing supervisor that a CNA on her team is not performing CNA duties correctly, or that she needed to "get on" a CNA. She testified that no

[80] A CNA working third shift testified that when she had to leave early upon receiving a call about a gravely ill family member, her LPN team leader called the unit manager, who spoke directly to the CNA and authorized her to leave.

[81] The director of nursing testified that an LPN would be written up if she observed a CNA doing something wrong and did nothing to correct it. The record does not contain any evidence that this has occurred.

CNAs on her team have refused assignments, but that if this occurred, she would inform her supervisor and ask for guidance, and possibly perform the task herself if it was necessary.

There is also no evidence in the record that LPN team leaders have been rewarded for the performance of CNAs on their team.

An LPN team leader testified that patient care takes up the majority of her shift. She testified that although she occasionally has to remind a CNA on her team to answer a resident's call light, take a resident's vital signs, weigh residents at the beginning of the month, or perform some other routine task, she generally does not have to tell her CNAs what to do because they have years of experience. For example, she has not had to show CNAs how to feed a resident. While CNAs on her team are informed of their break and lunch times on the daily assignment sheet, they notify this LPN team leader when they are leaving the nursing floor so she can find them if a resident needs them.

### 8. Evidence as to Evaluations of CNAs

The Employer evaluates CNAs upon completion of their 90-day probationary period[82] and annually thereafter. Evaluations do not affect the CNA's rate of pay, which are established by the collective-bargaining agreement.[83]

[82] The Employer considers newly hired employees "introductory" employees until they have completed 90 days and received a satisfactory performance evaluation.
[83] The director of nursing and the unit manager for Rosewood testified that CNA evaluations improve the Employer's patient care.

Until early August, 2010, the Employer used an evaluation form rating the CNA in six categories,[84] each on a scale from one to five, with one corresponding to "unsatisfactory" and five corresponding to "outstanding." The old form was called "performance evaluation form." It included a section titled, "areas of improvement, developmental plans and/or upcoming objectives" that the evaluator completed.

The evaluation form now in use is called "development feedback." It does not rate the CNA numerically but has a section in which the CNA evaluates herself in a series of "core values" and "teammate skills," marking for each category whether it is a "strength" or "opportunity." The new form also has a section that the CNA and evaluator complete together, identifying the top three areas for continued development and a plan to accomplish them.[85]

When the Employer began using the new form, it also switched from completing annual evaluations on the CNA's anniversary date to completing all CNA evaluations at one time.

The record reflects that LPN team leaders have evaluated the CNAs on their team using both forms, going back at least to 2008. For CNAs who float, any LPN team leader that has worked with the CNA may evaluate him. The unit manager for the Rosewood unit writes the same goals for all CNAs[86] on each evaluation form, and asks the LPN team leaders to meet with each CNA

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[84] These are "customer service," "work quality," "work quantity/productivity," "compliance and adherence to policies," "core values," and "leadership skills." The leadership skills category says it is only applicable to "RNs, LPNs, charge/unit RNs, department heads, etc."

[85] The director of nursing testified that the new form is meant to embody a more "positive" approach by involving the employee and supervisor working together to identify strengths and opportunities.

[86] She stated them as "no customer service complaints, no holes in their ADL (activities of daily living) books, completion of their job assignments."

individually to address concerns specific to the CNA, which are then documented on the CNA's evaluation form that the CNA and team leader sign. The form is then given to the unit manager who also signs it.

The record contains some completed evaluations using the prior evaluation form and some using the current form.[87] Evaluations using the prior form contain comments, apparently from LPN team leaders, both complimentary and critical of the CNA.[88] Evaluations using the current form contain various comments in the section identifying areas for continued development, such as reminders to update the care cards once a month and to discuss any changes with the team leader.

There is no evidence that any CNA has received discipline because of a failure to comply with directives or suggestions in evaluations.

## ANALYSIS

### *Whether LPNs Have Authority to Responsibly Direct CNAs*

The Employer maintains that LPNs exercise independent judgment when they responsibly direct CNAs.

The Board finds that an individual has the authority to responsibly direct an employee only if that individual is answerable for failing to do so. The preponderance of the evidence must show that the individual is "held fully accountable and responsible for the performance and work product of the

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[87] The unit manager for Rosewood acknowledged that she was not present at any of these evaluation meetings and did not see the LPN complete the form.

[88] For example, on one form, in the section titled "areas of improvement, developmental plans and/or upcoming objectives," the evaluator wrote "absenteeism and tardy needs improvement. Wear gait belt at all times." On another form, in the section titled "evaluator comments," the evaluator wrote "[name of CNA] is always willing to help out wherever needed. Even if not her assignment, she will assist all residents when needed."

employee." *Oakwood Healthcare*, 348 NLRB at 691, citing *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir, 1986).

To establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006). Thus, it is not sufficient to show that the putative supervisor has the authority to direct an employee and to take corrective action; the party seeking to establish supervisory status must also prove that the putative supervisor faces the prospect of adverse consequences.

The record establishes that the LPN team leaders have the authority to direct CNAs. The LPN team leaders "oversee the CNA's job performance and act to correct the CNAs when they are not providing adequate care." *Golden Crest Healthcare Center*, 348 NLRB at 730. For instance, an LPN occasionally reminds CNAs to take vital signs, weigh residents, or perform other tasks.

The record is less clear as to whether the LPN has the authority to take corrective action if a CNA fails to perform an assigned task, as I will explain in discussing whether LPNs have authority to discipline. However, even assuming that LPNs have authority to take corrective action, the record fails to establish that they face the prospect of adverse action if they fail to correct the performance of CNAs.

In *Golden Crest Healthcare Center*, the employer offered evidence that it evaluated charge nurses on their performance in directing CNAs. However, the employer failed to establish that any action, positive or negative, has been or might be taken as a result of the charge nurse's evaluation in this factor. The Board concluded that the employer had failed to show responsible direction. *Id.* at 731.

Here, there is no evidence in the record to suggest that any LPN "has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of his/her performance in directing CNAs." *Golden Crest Healthcare Center*, 348 NLRB at 731. In fact, the director of nursing and the unit manager for Rosewood testified that the LPN team leader is not disciplined when a CNA on his/her team fails to properly perform.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess the supervisory authority to responsibly direct CNAs.[89]

***Whether LPNs Have Authority to Assign CNAs***

The Employer contends that LPNs exercise independent judgment when they assign or reassign the work of CNAs.

The Board in *Oakwood Healthcare* defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing),

[89] The Employer cites testimony by the director of nursing that an LPN could face discipline if she failed to properly supervise a CNA and by a nursing supervisor that she would discipline an LPN if she observed the LPN failing to supervise an assigned CNA. However, "the Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status." *Golden Crest Healthcare Center* at 731; *Avante at Wilson*, 348 NLRB 1056, 1057 (2006).

appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare*, 348 NLRB at 689. The Board stated that "assign" for purposes of Section 2(11) "refers to the ... designation of significant overall duties to an employee, and not to the ... ad hoc instruction that the employee perform a discrete task." *Id.*

The Board cited an example of its interpretation: "In the health care setting, the term "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients... [I]f a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to "assign" for purposes of 2(11) refers to the charge nurse's designation of overall duties to an employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task." *Id.*

Moreover, the authority to assign is supervisory only if it involves the use of "independent judgment." In *Oakwood Healthcare*, the Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio." *Id.* at 693. On the other hand, "if the [nurse] weighs the individualized condition

and needs of a patient against the skills of special training of available personnel, the nurse's assignment involves the use of independent judgment." *Id.*

To begin with, the record reflects that LPNs routinely assign CNAs routine duties such as taking additional vital signs, preparing residents to visit doctors, etc. Assignments of these "discrete task[s]" in these circumstances is closer to "the charge nurse's ad hoc instruction that the employee perform a discrete task," *Oakwood Healthcare*, 348 NLRB at 689, than to the designation of overall duties. See also, *Croft Metals*, 348 NLRB 717, 721 (2006) (switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status).

It is clear from the record that the staffing coordinator has authority to assign CNAs with respect to shift, room, and resident. During first and second shifts on weekdays, the staffing coordinator determines shift and room assignments, break times, and lunch. Although the third shift and weekend LPN team leaders prepare their own unit assignment sheets, the record reflects that they do so mainly by transferring the information that the staffing coordinator has placed on the daily assignment sheets for these shifts.

I recognize that the staffing coordinator frequently grants requests by LPNs to assign (or not to assign) specific CNAs to their team, including some assignments on a permanent basis. However, the record fails to establish that in making such requests, the LPNs consider "the individualized condition and needs of a patient against the skills or special training of available personnel." *Oakwood Healthcare*, 348 NLRB at 693; accord *Children's Farm Home*, 324

NLRB 61, 64 (1997). Thus, while the staffing coordinator testified that she automatically grants LPN requests because LPNs know best how well they work with particular CNAs, and how well CNAs work with particular residents, the examples she provided did not involve weighing a particular CNA's skills and training against a specific patient's needs.[90] Instead, they appeared to reflect the personal preferences of the LPNs involved.[91] Furthermore, no current LPN who has made such a request testified.[92]

There is also insufficient evidence as to the criteria applied by LPNs in reassigning rooms to warrant a conclusion that LPNs exercise independent judgment. Thus, while there is some evidence that LPNs modify room assignments on the basis of patient requests, the record fails to demonstrate that LPNs exercise independent judgment when doing so, as opposed to simply satisfying the resident. Moreover, the record fails to establish the frequency with which this occurs.[93] The fact that an LPN asked a CNA who was new to her unit where she felt most comfortable before assigning her rooms similarly fails to show that this LPN exercised independent judgment.[94]

Similarly, although there is some evidence that night shift LPNs determine which CNA to reassign when a CNA is a no call, no show, the record does not

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[90] For example, the LPN who asked the staffing coordinator not to assign her a CNA after observing that CNA administer a bed bath with a wet towel did not indicate that this CNA lacked skills and training, but rather that the CNA had violated standard procedures.

[91] Thus, these requests lacked independent judgment, which requires, "at minimum ... form[ing] an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, 348 NLRB at 693.

[92] I note that the only current LPN who testified stated that she has to contact her supervisor before changing CNA room assignments.

[93] Thus, a former LPN testified that she did so based on patient requests, but this was in 2007-2008 and there are no examples of such reassignments within the past year.

[94] Assuming that an LPN team leader from the Rosewood unit reassigned a CNA from Southway on one shift to replace a CNA who was ill, the record does not reflect the factors she considered in selecting the CNA she chose.

reflect the criteria applied by the LPNs in making such reassignments. In this regard, when a Rosewood unit LPN reassigned a Southway unit CNA to replace a no call, no show in order to comply with an apparent state or policy requirement that at least three CNAs be assigned to each shift on the Southway unit, she was not exercising independent judgment. *Oakwood Healthcare*, 348 NLRB at 693.

While there is evidence that LPNs reassign CNAs to different or additional rooms to balance the workload, "[a]ssignments made solely to equalize the quantity of workloads are routine and do not require independent judgment." *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 9.

Finally, the Employer cites the fact that LPNs are the highest ranking employees on site during third shift. However, the "status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority." *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10. Secondary indicia are insufficient to establish supervisory status where the putative supervisors are not shown to possess any of the primary indicia. *Id.*; *Ken-Crest Services*, 335 NLRB 777, 779 (2001). "Moreover, this factor is even less probative when management is available after hours." *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10. The record reflects that the director of nursing is on call 24 hours per day, seven days per week.[95]

While the director of nursing testified that LPNs can require CNAs to work overtime, there is no record evidence of such an occurrence, and no evidence that any CNA has been disciplined for refusing to work overtime. Similarly, there

[95] I also note that the unit manager was available on the phone when a third shift LPN received notice of a family emergency and had to leave.

is no record evidence as to examples of, or the frequency with which, LPNs require CNAs to postpone breaks or lunch.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess the supervisory authority to assign CNAs.

***Whether LPNs Possess Authority to Discipline, Suspend, or Effectively Recommend Discharge***

The Employer argues that LPNs exercise independent judgment when they decide whether to initiate discipline, suspend, and recommend the discharge of a CNA.

The evidence with respect to the LPN's authority to initiate discipline, suspend and effectively recommend discharge essentially falls into two areas. First, there is evidence that LPNs may initiate discipline by issuing Level Two coaching plans to CNAs, suspending CNAs and making recommendations as to whether the CNAs should be discharged. Second, there is evidence that LPNs may discipline by issuing Level One coaching plans to CNAs. I will address these separately.

The evidence as to the LPN's authority to initiate discipline by issuing Level Two coaching plans, suspending CNAs and making effective recommendations as to whether to discharge or warn CNAs, is "in conflict or otherwise inconclusive," *Phelps Community Medical Center*, 295 NLRB 486, 490 (1985). The Level Two coaching plan form sub-title does not indicate whether the LPN completing the form is the one who suspends the CNA, or whether the LPN does so independently or needs the approval of a nursing supervisor or unit

manager. None of the LPNs who purportedly completed the Level Two coaching plan forms in the record testified. The director of nursing admitted that she was unable to provide a single example of an LPN team leader suspending a CNA. She testified that she inferred that because an LPN signed a Level Two form involving a CNA on this LPN's team, that LPN must have made the decision as to the ultimate discipline (a warning in that case). Inferences without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears Roebuck & Co.*, 304 NLRB 193, 194 (1991). I therefore find that there is insufficient evidence to show that LPNs possess supervisory authority when they initiate the Level Two disciplinary process or suspend CNAs for Level Two violations.

Similarly, there is insufficient evidence as to how the Employer investigates Level Two violations reported by LPNs, or how LPNs participate and what weight is given to their input. The testimony of the director of nursing that particular LPNs were "involved in" or "conducted" an investigation is conclusory and of little weight. *Id.* at 193. The Level Two coaching plan form does not have a space for any recommendation by the LPN completing the form, and the Level Two coaching plans in the record do not discuss the LPN's recommendation.

Even assuming that LPNs issue Level Two coaching plans for CNAs, it appears from the record that the LPN's main role is to identify the Level Two violation to the CNA and report it to the nursing supervisors, unit managers, and the director of nursing, after which the Employer conducts an independent investigation to determine the appropriate discipline. The Board holds that the

mere reporting of a violation does not demonstrate supervisory disciplinary authority: "Where oral and written warnings simply bring to an employer's attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function." *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ohio Masonic Home*, 295 NLRB 390 (1989); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991). Thus, while the LPNs may have authority to cite CNAs for Level Two violations, this is not sufficient evidence of authority to discipline, suspend, or effectively recommend discharge:

> [t]he power to 'point out and correct deficiencies' in the job performance of other employees 'does not establish authority to discipline.' Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.

*Oak Park Nursing Care Center*, 351 NLRB 27, 31 (2007) (Member Walsh dissenting), quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

In *Illinois Veterans Home*, 323 NLRB 890 (1997), the RNs completed "Personnel Action" forms to describe incidents involving problems with employees and the RNs discussed the incident with the employee after which the employee and the RN signed the form. The forms did not reflect any recommendations by RNs as to discipline. The director of nursing determined the ultimate discipline. The Board reversed the Regional Director, and found that the RNs' duties with respect to discipline were merely reportorial. *Id.* at 890.

I recognize that there have been isolated occasions on which an LPN has apparently suspended and recommended the discharge of a CNA and the Employer has agreed. In 2008, an LPN suspended a CNA and recommended her discharge for threatening and screaming at the LPN, and the CNA was discharged. In April 2009, the Employer agreed with an LPN's recommendation to discharge a CNA who had negligently taken a resident on oxygen into the courtyard and allowed her to smoke, resulting in injuries to the resident. However, "the exercise of some 'supervisory authority' in a merely ... sporadic manner does not confer supervisory status on an employee." *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (quoting *Browne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986).[96]

LPNs automatically issue Level One coaching plans for attendance violations. When a CNA accrues a third occurrence within 30 days, the staffing coordinator forwards documentation to the unit manager, who instructs the LPN to prepare and issue the coaching. The LPN does not exercise independent judgment in such cases. *Anamag*, 284 NLRB 621, 622 (1987) (team leaders do not exercise independent judgment in disciplining employees for attendance violations where warnings are automatically generated when employee accumulates a set number of occurrences).

The record reflects that the unit manager initiates some Level One coaching plans when directly contacted by a complaining resident or family

[96] Further, given the overtly inappropriate nature of the CNA's conduct in both cases, it appears that the LPNs did not exercise independent judgment in preparing Level Two coaching plans. "The Board has found that in cases of flagrant offenses, the offenses are obvious violations of the employer's policies and speak for themselves, no independent judgment is involved." *Children's Farm Home*, 324 NLRB at 67; see also *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

member, or when she observes a CNA violate a Level One customer service standard, and that LPNs also initiate Level One coaching plans for a variety of Level One violations. Some of the testimony in this regard was vague, such as the unit manager's testimony about a Level One coaching plan stating that a CNA gave "rough" treatment to a resident. Moreover, an LPN testified that she consulted the weekend supervisor before issuing her only Level One coaching plan in ten years.

Even assuming that the record establishes the LPN's authority to initiate Level One coaching plans, the record does not establish a nexus between a Level One violation and possible future disciplinary action, other than the policy in the Handbook stating that a CNA who accumulates four active Level One coaching plans is discharged. The record contains no evidence that this has occurred. Thus, there is insufficient evidence that the LPN possesses supervisory authority to discipline when issuing Level One coaching plans.

This conclusion is reinforced by the testimony of the unit manager for Rosewood that, when she was hired, the director of nursing informed her "[t]hat the immediate supervisors needed to be the ones to do the coachings; as far as their disciplinary action, they had to be [sic] follow-up with the chain of command." This suggests that Level One coaching plans are not, in themselves, disciplinary documents, and that discipline can only issue through the "chain of command" – nursing supervisors, unit managers, and the director of nursing, so that LPNs coach but don't discipline CNAs.

The job descriptions for LPN and unit manager further support my conclusion. The unit manager's job description says she has "day to day supervision of licensed and non-licensed staff, including counseling/disciplinary action, evaluations, one-to-one inservice, suspension/terminations." By contrast, the LPN's job description directs her to report performance related issues of CNAs to a nursing supervisor.

Finally, although it appears that the signature of an LPN on a CNA's time clock adjustment slip suffices to generate the adjustment in the CNA's payroll record and thus her pay, "the Board has consistently held that the authority to verify employees' time cards is routine and clerical and does not indicate supervisory authority." *Golden Crest Healthcare*, 348 NLRB at 730, fn. 10.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess authority to initiate discipline of CNAs by issuing Level One or Level Two coaching plans, or to suspend CNAs or to effectively recommend their discharge.

***Evaluations***

The Employer contends that the performance evaluations completed by LPNs on CNAs are an indicium of supervisory status because they instruct or direct CNAs to change their job performance.

A putative supervisor's authority to evaluate employees only indicates that he has supervisory authority if the evaluations have a demonstrable impact on employees' terms and conditions of employment or job status. *Williamette*

*Industries*, 336 NLRB at 744; *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999).

The Employer has failed to establish that the evaluations of CNAs performed by LPN team leaders have an impact on the CNAs' job status or terms and conditions of employment. Evaluations have no impact on wage rates. Although the evaluations instruct CNAs as to improvements needed in their work performance, "there is no evidence that the Employer has taken any action in response to an employee's failure to follow an evaluation's recommendation." *Williamette Industries*, 336 NLRB at 744.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPNs' authority to evaluate CNAs indicates that they possess supervisory authority.

## CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All licensed practice nurse team leaders[97] employed at the Employer's facility located at 1010 Carpenter's Way, Lakeland, Florida, excluding all other employees, guards, and supervisors as defined in the Act.

**Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers, Local 1625. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

**Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military

[97] The eligibility of PRN LPNs shall be determined by the formula set forth in *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). PRN LPNs shall be eligible if they regularly averaged at least four hours per week during the calendar quarter immediately preceding the election eligibility date.

service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

**Employer to Submit List of Eligible Voters**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **October 1, 2010**. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be made available to all parties to the election, please furnish two copies of the list.[98]

**Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

**Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by **October**

[98] The lists may be submitted by facsimile transmission to (813) 228-2874, or electronically to Region12@nlrb.gov., as well as by hard copy. See www.nlrb.gov for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

**8, 2010.** The request may not be filed by facsimile, but may be filed electronically.[99]

DATED at Tampa, Florida, this 24th day of September, 2010.

Rochelle Kentov, Regional Director
National Labor Relations Board,
Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

[99] See www.nlrb.gov for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.